This is from a 1966-67 Proposal for an "affirmative" judicial challenge to the war, somewhat similar to the present NECLC suits. I am now seeking publication.

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THE WORLD'S MOST POWERFUL SCOFFLAW

U.S. Violations of the U.N. Charter and other Treaties, In Vietnam and Other Cold War Battlefields: Their Significance And Long-run Implications for America's Own National Security.

In their pursuit of cold war objectives in Vietnam, the present and previous administrations have violated many laws, both domestic and international, including Article 8 (11) of the U.S. Constitution giving to Congress the sole right to declare (or make) war, the 1949 "Red Cross" treaty requiring humane treatment of war prisoners and civilian populations in areas of war, and the "Nuremberg Law" under which "war in violation of international treaties, agreements or assurances" is an internationally punishable "crime against the peace." (At the 1954 Geneva Conference the U.S. gave a unilateral assurance that it would not use force or threat of force against "the sovereignty, the independence, the unity, and the territorial integrity" of Vietnam.)

However, in relation to the longer-run quest for a genuine and lasting world peace based on law and justice, the most important laws now being violated are the key articles 2 (4) and 1 (2) of the United Nations Charter. As a duly-ratified treaty, the U.N. Charter is part of the United States' own "Supreme Law" (U.S. Constitution, Art. 6 (2)), binding on both government officials and private citizens, and, like all other laws, subject to interpretation by U.S. Courts.

Articles 2 (4) and 1 (2) require that "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations . . . To develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples . . . "

Under the 1954 Geneva Agreements Vietnam was established as a single, unified state. These agreements explicitly provided that the "provisional military demarcation line" at the 17th parallel "should not in any way be interpreted as constituting a political or territorial boundary", and that "general elections which will bring about the unification of Vietnam" were to be held by July, 1956. There was no provision whatever for any independent political authority in south Vietnam after French withdrawal. It was generally recognized at the time (cf. Eisenhower's memoirs and JFK Senate speech of 4/6/54) that Ho Chi Minh and the Communist-led Vietminh had the overwhelming support of the people of both north and south and would win any free and fair election.

In 1955, under U.S. pressure, the French left Vietnam without fulfilling their own obligations for the 1956 elections, and the series of dictatorships which have since ruled south Vietnam under U.S. sponsorship and military protection have effectively rigged every subsequent "election" -- including the most recent, in 1967 -- to prevent any possible victory for the Communist-led National Liberation Front, or, in fact, any other candidates strongly opposed to the dictatorship. Contrary to widespread liberal opinion the present war could hardly meet the definition of a genuine "civil" war, even though Vietnames are killing Vietnamese. In 1955 Diem, then with-scarcely any real power, was able to denounce the Geneva Agreements only because the threat of direct U.S. intervention prevented the Vietminh from returning to the south to enforce these agreements; and whatever political and military power Diem and his successor have had since then has been created and financed almost entirely by the U.S. and would collapse if this support were withdrawn.

Thus, for the past 12 years, in its effort to establish the

southern half of Vietnam as a separate anti-Communist state under U.S. control, the U.S. has, in fact, been using force and threat of force both against the territorial integrity of the state of Vietnam, as that state was established, de jure, by the Geneva Agreements, and to prevent the political self-determination of the people of Vietnam -- with the predictable effect on "friendly relations among nations" which was undoubtedly the primary reason for the precise wording of these provisions of the U.N. Charter.[1]

The legal basis for a Supreme Court ruling on the Vietnam War lies primarily in the fact that, under the U.S. Constitution, these violations of the U.N. Charter are also violations of the "Supreme Law" of the U.S. itself. Though much less important in relation to the broader framework of international law and order, it is also true that the U.S. is fighting in Vietnam without any Declaration of War by Congress, as required by Art. 8(11) of the Constitution, and without Congress even having had any genuine opportunity to deliberate the issue. Under such illegal conditions, drafting a man for military service in Vietnam constitutes a deprivation of "life, liberty or property without due process of law," in violation of the 5th Amendment.[2] The same is true with regard to taxes used to finance such a war.

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1. The situation is very similar, on both counts, in the U.S. protectorate over Taiwan (Formosa).

2. Technically, government actions to carry out a treaty violation also consitute a conspiracy -- "An agreement among two or more persons to do an unlawful act" -- and the government has no legal right to compel the participation of others in such an act. The conspiracy argument played an important role in the Nuremberg war crimes trial and undoubtedly would be applied again if such a hostile international court were ever to sit in judgment on present American leaders. But the "due process" approach is more familiar to the Supreme Court and has the political advantage that it carries no implicit reflection on the motives of those engaged in the illegal activity.

The More Basic, Long-run Issue:
U.S. respect for international law, morality and justice under the United Nations.

The most basic issue underlying this case is whether respect for the principles of the United Nations Charter -- and, more generally, for the rule of law and justice in international affairs -- shall take precedence over cold-war ideology and apparent short-run national self-interest in the conduct of U.S. foreign policy. In other words, should the U.S. really consider itself bound to respect its international commitments, in substance as well as in lip service? This is a question which has not yet been squarely faced by the Supreme Court. But the Court, with its relatively long-range perspective, its relative insulation from political pressure, and its institutionalized focus on basic issues, is particularly qualified to do so.

In a longer-range perspective, internationally as well as domestically, the most basic principle of peace, law and order is the right of self-determination: the "inalienable right" of all peoples to choose their own leaders and their own way of life (as President Johnson so often said!) as long as they do not interfere with the similar rights of others.

A self-evident corollary of this principle, however, and one eloquently expressed in our own Declaration of Independence, is that where people have no effective peaceful and legal means for choosing their own leaders and policies (e.g. through free and fair elections), the right of "self-determination" inherently implies the right of armed revoluation. Since it is axiomatic that no revolution can be successful against the entrenched power of an established government and social system unless it has overwhelming popular

support,[1] revolutions have always been recognized in historical retrospect (as distinguished from the narrow perspective of the overthrown government itself) as a mean of popular self-determination. Thus, respect for the principle of self-determination necessarily implies, at the very least, the obligation of all other states to refrain from intervention on either side of another country's internal conflict.

Yet the primary basis of U.S. foreign policy for the past 25 years has been the "cold-war" Truman Doctrine. This Doctrine is based on the ideological assumption that "freedom" is inseparable from the private (and particularly American) ownership of industrial and agricultural property, and asserts that "it must be the policy of the U.S. to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressure" (italics added). Since this policy leads the U.S. to give military and economic aid to even the most oppressive and unpopular military dictatorships (which are, by definition, "armed minorities") as long as they are anti-Communist and permit relatively free operation of American business enterprise, the conclusion is inescapable that the term "free peoples" actually refers only to the private property owners (including U.S. business corporations) who are threatened by political movements and/or public policies which would restrict their freedom to use their property as they see fit. Secondly, this policy has been extended to include U.S. military assistance for the overthrow of existing governments which are not to our liking, whether these were initially estab-

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1. That is, a genuine national revolution, as distinguished from a foreign-supported counter-revolution against a newly-established and weak reformist government, as in Spain, where Gen. Franco won with the aid of the German air force and Italian troops, and in Guatemala, where Gen. Castillo Armas won with the aid of the CIA.

lished by armed revolution (as in Cuba and Indonesia) or by peaceful elections (as in Guatemala and the Dominican Republic). Thirdly, since the United Nations itself already has adequate power to prevent overt military aggression by one small nation against another small nation, most of the military aid which the U.S. now gives to so many governments around the world admittedly serves primarily to protect these governments from their own people. This assertion by the U.S. that it has a right to unilateral military intervention in the internal affairs of other nations is clearly a violation of Articles 2(4) and 1(2) of the United Nations Charter.

It is important to note the specific wording of Article 1(2)- it is the purpose of the U.N. "To develop friendly relations among nations based on respect for the principle of . . . self-determination ..." It was quite clear to the framers of the Charter -- including the U.S. delegates -- that unilateral military intervention by one nation in another country's internal affairs offers an open invitation to intervention by other foreign powers, and that this type of behavior is quite incompatible with world peace and security.

The Charter contains no explicit prohibition against foreign efforts to influence the domestic affairs of another nation by missionary activity, bribery by private business corporations, manipulating prices on world markets, granting or withholding credit, economic boycott, granting or withholding economic aid, propaganda, political organization, or any of the other forms of peaceful influence ("fair" or unfair) normally used in domestic politics. The Charter forbids only military intervention. And it is important for the U.S. to take note itself of something which has long been noted abroad: that when the economically most powerful nation in the world

resorts to violence to achieve its ends, this is a tacit admission that it feels it cannot win in the world ideological competition by fair and peaceful political means. Thus, behavior which we utterly condemn in our own domestic politics, we demand the right to use abroad. One of the most dangerous and insidious aspects of this policy is that as long as we assert the right to use violence wherever we want, we have no particular incentive to develop more skill in using the peaceful political methods of competition. (The situation is somewhat similar to the police use of third-degree methods of interrogation, and Southern use of the KKK to prevent Negroes from voting.)

In effect, the cold-war Truman Doctrine is based on the principal that "might makes right". But as Germany and Japan discovered to their sorrow this principle has one potentially fatal flaw: because it destroys international respect for the "rule of law" it can serve our own selfish interests only so long as we are able to maintain absolute military superiority over any possible hostile combination. Today the U.S. still retains such superiority. But it is worth considering how potentially thin is the margin:

1) Our military power now depends primarily on our vast superiority in nuclear weapons and the means for their delivery. But this superiority has already been largely neutralized in the case of the USSR, and it is estimated that it will take no more than 10 or 15 years for China to achieve a similar "neutralizing" capability. It is true that we might possibly be able to destroy China's present nuclear installations by bombing. But this is by no means certain. In view of our continued threat, China may already have constructed secret underground facilities. Furthermore, Russia remembers bitterly the "lesson

of Munich" -- where the West stood aside in the mistaken hope that Germany would vent its aggressiveness only in an anti-Communist drive to the East -- and may well feel that she cannot afford to allow such a blow at China to go unchallenged, however much she fears and detests the present Chinese government. (It is worth remembering that Russia also has internal differences of opinion, and that Russia's present government, which is relatively conciliatory by Chinese standards, might not survive a U.S.attack on China). In any event, it is quite certain that such bombing would utterly destroy our pretense to moral respectability in the eyes of other nations, and would thus lay the moral groundwork for a united world alliance against us.

2) The greater the proliferation of atomic weapons to other powers, the less will be the comparative security offered by our own - and the less real security there will be for anyone. Yet there can be little hope for pursuading other nations to forego this form of national power as long as we show, by our own example, that international disputes are settled on the basis of "might makes right" rather than on the basis of international law and justice.

3) Since our conventional forces, with overwhelming air power and violating all "laws of war", were unable to defeat tiny Vietnam with a population less than 15 million, how could they hope to cope with a coordinated guerilla movement in many different countries at the same time with a combined population in the billions? Our present policies may well lead to just such coordination.

4) The 200 million citizens of the U.S. constitute a very small "white", race-prejudiced, highly-privileged, wealthy minority in a world of 3,500 million people, two-thirds of whom are both colored

and poverty-stricken. In the "century of the common man" where the rule of privileged minorities is being challenged all over the world, our 6% of the world's population controls nearly two-thirds of the world's industrial wealth and use of natural resources. Although this wealth is the primary factor in our present national power, if we use it only for our own benefit and to protect ourselves from the have-nots, it makes us potentially vulnerable to the envy and hatred of the less fortunate majority -- in much the same way as are the small white minority in Southern Rhodesia.

If there could be a really significant degree of world disarmament, and if a relatively large part of the funds which we are now spending on arms could go instead to the economic development of the poorer nations (without the political and ideological restrictions which largely offset the value of much of our present economic aid), the rising tide of resentment from the poorer nations could undoubtedly be reduced. But here is another of the dilemmas caused by our own cold-war policy: we cannot feel secure in reducing our own arms expenditure until others do likewise. But it is useless to expect others to disarm as long as we continue to treat the U.N. as merely an agent (though sometimes unruly) of U.S. foreign policy -- i.e. as long as they cannot look to the U.N. as an agency through which they can achieve their own just and legal national interests without resort to arms.

The U.S. is often referred to editorially as the "world's policeman". But the essential function of a policeman is to enforce the law. A man who uses a gun to pursue his own advantage in violation of the law is not called a policeman but a gangster or vigilante.

It has been obvious for many years that the sheer survival of civilization depends on establishing "the rule of law" in international relations -- law based on justice and mutual respect and tolerance. The United Nations Charter provides a solid basis, or core, for such a rule of law. But the U.N. is not yet constituted in such a way that it can enforce the provisions of the Charter—or any other international laws and agreements—when they are violated by Great Powers. Because the U.S. is still the richest and most powerful nation in the world, the U.N. is today essentially what the U.S. makes it. It is quite clear that <u>in the long run</u>, when the national power of China and other presently underdeveloped countries become relatively greater, it will be very much to our own national advantage to have a strong U.N. with well-established principles of international law. But that may be possible only if we are willing today, while we still have this preponderant power, to subordinate our own apparent short-run interests to the principles of justice and mutual respect contained in the U.N. Charter.